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November 12, 2021

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Ave NW
Washington, DC 20580

Dear Chair Khan,

We write to you regarding the Federal Trade Commission's (FTC) notice sent on October 6, 2021 to 70 proprietary educational institutions warning that misleading or deceptive claims will be met with significant financial penalties under the FTC's Penalty Offense Authority.¹ Given this authority has not been employed for several decades, there is significant uncertainty in the education industry regarding this announcement. As such, we request written responses to the following questions by November 26, 2021.

1. The FTC's recently announced enforcement effort is targeted at for-profit institutions; however, public and private non-profit institutions often use the same claims when advertising to prospective students that you cite in your notice as potential violations of Section 5. Even if FTC lacks jurisdiction over public and private non-profit entities, why hasn't the FTC encouraged state attorneys general and the U.S. Department of Education (Department) to scrutinize public and private nonprofit institution that make false and misleading statements about similar matters?
2. The FTC's new enforcement approach to Section 5 and related public campaign is a radical departure from its prior interpretation of Section 5 oversight over "unfair methods of competition in or affecting commerce." What enforcement authority does the FTC have with respect to Section 5? What limitations are there on the FTC with respect to Section 5?

¹ <https://www.ftc.gov/news-events/press-releases/2021/10/ftc-targets-false-claims-profit-colleges>

3. The cases noted in the FTC's notice of penalty offenses are 40 to 70 years old and provide no meaningful guidance to the regulated community given the significant changes that have occurred in the higher education landscape since this authority was last used. What further communication do you expect to share with the education industry about the FTC's new enforcement approach for proprietary institutions?
4. Have the FTC and other federal and state agencies - including state Attorneys General, the Consumer Financial Protection Bureau (CFPB), and the Department - held any formal or informal discussions or meetings to strategize how to maximize student loan forgiveness? A number of public communications have promoted the Department's Borrower Defense to Repayment (BDR) process that appear to misrepresent the potential prospects for loan forgiveness.² Please provide data regarding the FTC's communications that demonstrate that it has not misled borrowers to believe they will receive relief when the chances for relief are limited under current regulations.
5. What impact does the FTC expect its new interpretation of Section 5 will have on the number of claims filed and positively adjudicated under the BDR regulations? Again, since the BDR rule applies to public and private nonprofit institutions to prevent false and misleading claims, will the FTC and the Department partner with state attorneys general to prohibit claims made by those schools?
6. In a press release announcing the notice, the FTC stated it was "sending a Notice of Penalty Offenses to the [70] institutions . . . the companies operating these colleges will be on notice that they could incur significant sanctions for engaging in certain unlawful practices."³ Indeed, the FTC Act requires a showing that defendants have "actual knowledge or knowledge fairly implied on the basis of objective circumstances."⁴ During the subsequent press conference, the Director of the FTC's Bureau of Consumer Protection, Mr. Sam Levine, stated that "schools that do not receive the notice can nevertheless face liability if they are shown to have actual knowledge of the Commission's determination."⁵ Why did the FTC decide to target the 70 institutions specified in the notice rather than sending the notice to all institutions in the proprietary sector?
7. The FTC has been rebuked in the past by courts when its commissioners "make speeches which give the appearance that the case has been prejudged."⁶ Here, the FTC has publicly released a list of 70 proprietary institutions that received the notice, creating the

² <https://www.consumer.ftc.gov/blog/2021/10/profit-colleges-notice>

³ Press Release, F.T.C., FTC Targets False Claims by For-Profit Colleges, Oct. 6, 2021), <https://www.ftc.gov/news-events/press-releases/2021/10/ftc-targets-false-claims-profit-colleges>

⁴ 45 U.S.C. § 45(m)

⁵ Press Conference, F.T.C., (Oct. 6, 2021).

⁶ *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 590 (DC Cir. 1970).

perception that the named institutions have engaged in wrongdoing. Indeed, the FTC's decision not to send notices to all proprietary institutions indicates that it plans to focus enforcement efforts on these 70 institutions, even though there is no record that the named institutions have engaged in wrongdoing. How can the named institutions expect to be treated fairly in any action taken by the FTC after being named in this notice? Will the FTC commit to removing the list of institutions from its website?

8. Former FTC Commissioner Mr. Rohit Chopra held a press conference on October 5, 2021, to announce the FTC's decision on its untested Penalty Offense Authority. This press conference was held five days after the U.S. Senate confirmed his nomination to serve as Director of the CFPB and was then sworn in on October 12, 2021. The FTC is designed to be an independent executive branch agency and we are concerned that Mr. Chopra will attempt to influence FTC enforcement actions while at the CFPB. What efforts has the FTC taken to ensure that it can act independently without undue influence from Mr. Chopra and the CFPB?
9. During the press conference announcing the FTC's notice, Director Levine stated that the FTC developed the list of 70 institutions by pulling publicly available data from the Department on institution's revenue and enrollment. What databases were used to inform the list? What award year did the FTC use in pulling revenue and enrollment data on these institutions? Did the FTC rely on revenue from federal student aid only or all revenue sources? Did the FTC coordinate with the Department, the CFPB, or any other entity in creating the list or developing the methodology?

Please contact Chance Russell (chance.russell@mail.house.gov) with the Committee Staff and Kevin O'Keefe (kevin.okeefe@mail.house.gov) with Representative Keller's staff with any questions regarding this request. Thank you for your prompt reply to this letter.

Sincerely,



Virginia Foxx
Ranking Member
U.S. House Committee on Education and Labor



Fred Keller
Member of Congress



Joe Wilson
Member of Congress



Burgess Owens
Member of Congress

A handwritten signature in black ink, appearing to read "Michelle Steel". The script is fluid and cursive, with the first name "Michelle" and last name "Steel" clearly distinguishable.

Michelle Steel
Member of Congress